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IN THE  
**Supreme Court of the United States**

October Term, 1950

No. 147

THE STATE OF WEST VIRGINIA, at  
the Relation of DR. N. H. DYER,  
et al.,

*Petitioner,*

v.

EDGAR B. SIMS, Auditor of the State  
of West Virginia,

*Respondent.*

**BRIEF OF THE STATES OF OHIO, INDIANA, ILLINOIS, KENTUCKY, PENNSYLVANIA, AND NEW YORK, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

HERBERT S. DUFFY,  
*Attorney General of the State  
of Ohio*

WILLIAM C. BRYANT,  
*Assistant Attorney General of the  
State of Ohio*

EMMETT McMANAMON,  
*Attorney General of the State  
of Indiana*

E. FUSK,  
*Attorney General of the Common-  
wealth of Kentucky*

QUIRE N. WILLIAMS, JR.,  
*Assistant Attorney General of the  
Commonwealth of Kentucky*

IVAN A. ELLIOTT,  
*Attorney General of the State  
of Illinois*

LUCIEN S. FIELD,  
*Assistant Attorney General of the  
State of Illinois*

NATHANIEL L. GOLDSTEIN,  
*Attorney General of the State  
of New York*

CHARLES J. MARGIOTTI,  
*Attorney General of the Common-  
wealth of Pennsylvania*

H. F. STAMBAUGH,  
*Special Counsel to the Attorney  
General of Pennsylvania*

M. VASHTI BURR,  
*Deputy Attorney General of the  
Commonwealth of Pennsylvania*

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This brief is filed on behalf of the States of Ohio, Indiana, Illinois, Kentucky, Pennsylvania and New York, as amici curiae, by the chief legal officers of these States under authority of Rule 27, paragraph 9, Rules of the Supreme Court of the United States.

**STATEMENT OF THE CASE**

The Petition for a Writ of Certiorari which has been filed in this case contains a full statement of the facts in-

involved and the proceedings in the Court below. Inclusion of a similar statement in this brief would be repetitious and would serve no useful purpose. Therefore, Petitioner's Statement of the Case will be adopted for the purposes of this brief, supplemented, however, by emphasizing the fact that each of the States on whose behalf this brief is being filed ratified and enacted into law the Ohio River Valley Water Sanitation Compact in complete reliance upon the ability of each of the other signatories, including the State of West Virginia, to do likewise. Petitioner's Statement of the Case should be further supplemented by calling the attention of the Court to the fact that, since the Ohio River Valley Water Sanitation Compact became effective, each of the States on whose behalf this brief is being filed has undertaken to carry out its respective responsibilities thereunder and has made its proportionate financial contribution to its administration in full expectation that each of the other signatories, including the State of West Virginia, could and would do likewise.

### **RULING OF THE COURT BELOW**

Two opinions were filed in the Supreme Court of Appeals of West Virginia in this cause. The majority opinion (three Justices) was filed on April 4, 1950, (Record p. 14), and is reported in 133 West Virginia Reports, page not yet determined, and in 58 Southeastern Reporter, 2nd. Series, 766. A dissenting opinion (two Justices) was filed on April 12, 1950, (Record p. 32) and is reported in 133 West Virginia Reports, page not yet determined, and in 58 Southeastern Reporter, 2nd. Series, beginning at page 777.

In its judgment dismissing the Petitioner's application for writ of mandamus, the Supreme Court of Appeals of West Virginia held that the ratification of the Ohio River Valley Water Sanitation Compact by the legislature of that State was an unconstitutional legislative act, for the reason that it violated Article X, Section 4, of the Constitution of West Virginia, and for the further reason that it resulted in an unconstitutional delegation of police power. The Court then concluded that since this legislative ratification was unconstitutional, it followed that the appropriation by the legislature of West Virginia of funds for the use of the Ohio River Valley Water Sanitation Commission was improper and that Respondent was justified in refusing to honor the requisition which had been submitted to him for the issuance of a warrant authorizing such payment.

### **JURISDICTION OF THIS COURT**

The ruling of the Supreme Court of Appeals of West Virginia directly involves the validity and the construction of the Ohio River Valley Water Sanitation Compact. This Compact was entered into by the States of New York, Kentucky, Indiana, Ohio, Illinois, West Virginia, Pennsylvania and Virginia, and was executed on behalf of said States on June 30, 1948, pursuant to enabling legislation adopted by each of said States. The consent and approval of Congress had been expressly given said interstate compact by Public Number 739—Seventy-Sixth Congress, Chapter 581—Third Session, S. 3617, approved July 11, 1940.

Petitioner seeks to invoke the jurisdiction of this Court under Title 28, United States Code, Section 1257(3), by

virtue of a "title, right, privilege or immunity" having been "specially set up or claimed under the constitution \* \* \* of the United States," in the Court below.

The title, right, privilege or immunity which was specially set up and claimed in this case is the Ohio River Valley Water Sanitation Compact, the validity of which, as applicable to the State of West Virginia, has been denied by the judgment of the Court below, on grounds which have already been pointed out.

In *Delaware River Joint Toll Bridge Commission v. Colburn* (1940), 310 U. S. 419, a case involving construction of an interstate compact between Pennsylvania and New Jersey, Mr. Justice Stone said (p. 427):

"We granted certiorari, 308 U. S. 549, the questions of the construction of the compact between states and of the jurisdiction of this court being of public importance."

Further, in the opinion in this case the following language is found:

"In *People v. Central Railroad*, 12 Wall, 455, jurisdiction of this court to review a judgment of a state court construing a compact between the states was denied on the ground that the compact was not a statute of the United States and that the act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This decision has long been doubted, see *Hinderlider v. LaPlata Co.*, 304 U. S. 92, 110, note 12, and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, Sec.

tion 10, Clause 3 of the Constitution, involves a federal 'title, right, privilege or immunity' which when 'specially set up and claimed' in a state court may be reviewed here on certiorari under Section 237(b) of the Judicial Code, 28 U.S.C. Sec. 344."

In *Hinderlider v. LaPlata River & Cherry Creek Ditch Company* (1938), 304 U. S. 92, 110, 82 L. Ed. 1202, 1212, 58 S. Ct. 803, the validity of an interstate compact between Colorado and New Mexico was objected to in the courts of Colorado on the ground that it violated the due process clauses of the Fifth and Fourteenth Amendments of the Federal Constitution and Section 25 of the Constitution of Colorado. The Supreme Court of Colorado in its judgment held that this compact was invalid in part on the ground that it violated the provisions of the state constitution.

Notwithstanding this fact this Court accepted jurisdiction in that case by writ of certiorari under Section 237(4) of the Judicial Code (Now 28 U.S.C. 1257 (3)). Accordingly, this Court may review the judgment of the Supreme Court of Appeals of West Virginia in this case notwithstanding the fact that state constitutional questions are involved in part; nor is this Court bound by the decision of the Court below with respect to state constitutional questions insofar as they relate to the validity of the compact here under consideration.

In *Kentucky v. Indiana* (1930), 281 U. S. 163, 74 L. Ed. 784, a case involving the construction of a compact between those two states in which the original jurisdiction of this Court was invoked, this Court proceeded to a final deter-

mination of the case notwithstanding the fact that litigation was then pending in the state courts of Indiana in which the question of validity of the compact was raised on the ground that the action of the state of Indiana in ratifying the compact was "unauthorized and void." This is precisely the question raised in the instant case, it being claimed by Respondent that the action of the legislature of West Virginia in ratifying this interstate compact was unauthorized and void. In ruling on this question this Court (in *Kentucky v. Indiana*) said (p. 176):

" \* \* \* this Court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either state, as well as of acts of Congress, which are said to authorize the contract, in no way affects the duty of this Court to act as final, constitutional arbiter in deciding the questions properly presented."

If this Court is the "final, constitutional arbiter" in questions relating to the construction of interstate compacts it would appear to be of small moment whether the case calling for construction of such an interstate compact comes before the Court by way of original jurisdiction or, as in the case at bar, by writ of certiorari.

Moreover, this Court, in proceeding to a final determination of the cause without awaiting determination of the litigation then pending in the Indiana courts, inferentially, at least, held that it had the authority to determine the question of the validity of this Compact re-

gardless of what the decision might be in the state courts as to the constitutionality of the action of the State of Indiana in ratifying such compact. This again is precisely the situation in the case at bar.

It is apparent from the majority opinion of the Supreme Court of Appeals of West Virginia that Federal questions of substance were necessarily involved in the decision of said court. This is made clear by the following portion of the opinion (58 S.E. 2nd., beginning at page 775, Record, page 28):

"As stated above, the thirteen colonies existing at the date of the Declaration of Independence became independent and sovereign states, and the states which have been since admitted into the Union, under the Constitution, are likewise independent and sovereign states, but all are subject to the powers delegated to the Federal Government by the original Federal Constitution, and the Amendments thereto adopted from time to time. After the adoption of our Constitution, any one of the thirteen states could have entered into a compact with another without any interference on the part of the

remainder of the other states. However, when our Federal Constitution was adopted, it was provided by Section 10 of Article I thereof that: "No State shall, without the Consent of Congress \* \* \* enter into any Agreement or Compact with another State, \* \* \*"

*"This provision, of course, recognized the right of the State to enter into compacts with other states, with the consent of the Federal Government, which could only be effected by an Act of Congress. This recognition of the right to make such compacts between states furnishes the basis for the jurisdiction of the Federal courts should a controversy arise between two or more states, as provided by Section 2 of Article III of the Constitution of the United States, by which Section it is also provided that in controversies to which a state shall be a party, the Supreme Court of the United States shall have original jurisdiction. All this being true, we are driven to the conclusion that if the challenged act and compact be upheld, the Legislature has, in all reasonable probability, bound future Legislatures to make appropriations for the continuation of the activities of the Sanitation Commission, and this, we think, amounts to the creation of a debt inhibited by Section 4 of Article X of our State Constitution."* (Emphasis supplied.)

From the above quoted portion of its opinion, it is apparent that the Supreme Court of Appeals of West Virginia recognized the right of the state to enter into compacts with other states, as provided in the Constitution of the United States, but held, nevertheless, that such right was subject to state constitutional provisions.

Also, in holding that the legislative authorization for West Virginia to enter into the Ohio River Valley Water Sanitation Compact resulted in an unconstitutional delegation of police power, the Court stated (58 S. E. 2nd., beginning at page 776, Record, page 30):

“ \* \* \* . This being true, when a Legislature undertakes to delegate to any citizen, any municipality, or any other agency of the government inside the State, in perpetuity, *or attempts to make a compact with another state or states, or with the Federal Government, by which it so delegates a part of its police power to be used within this state or outside this state, it attempts to do something which it does not possess the power to do.* \* \* \* ” (Emphasis supplied.)

It is thus apparent that the Supreme Court of Appeals of West Virginia was of the opinion and held that an interstate compact, even though sanctioned by Congress, which directly related to matters embraced within the police power of West Virginia, was an unconstitutional delegation of police power. The implication from this holding is that any interstate compact, relating to the police power of a state, may be an unconstitutional delegation of police power, and thus be invalid.

The Supreme Court of Appeals of West Virginia thus considered and passed upon Federal questions in its opinion, and the decision thereon was a necessary part of the ruling of the Court. It has been held that a Federal question which was treated as open, and decided by the State Supreme Court, will be reviewed in the United States Su-

preme Court without inquiring whether its Federal character was adequately called to the attention of the state trial court. (*Hill v. Smith* (1923), 260 U. S. 592.)

In *Cissna v. Tennessee* (1918), 246 U. S. 289, at 293, the Court made the following statement:

"The record does not show that Cissna specially set up in the state courts any contention that the decision of the merits turned upon questions of federal law, except as this may appear by inference from the nature of the grounds upon which the decision was rested. But if the Supreme Court of the State treated federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised. *Miedreich v. Laenstein*, 232 U. S. 236, 243; *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 257; *Mallinckrodt Works v. St. Louis*, 238 U. S. 41, 49."

### QUESTIONS PRESENTED

1. Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, can be limited or restricted by the provisions of its own constitution.

2. If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by the provisions of its own constitution, does Article X, Section 4, of the Constitution of the State of West Virginia restrict such power?

3. If Article X, Section 4 of the Constitution of the State of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the Ohio River Valley Water Sanitation Compact subject the State of West Virginia to any obligation in violation of the above mentioned Article and Section of its constitution?

4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the Legislature of the State of West Virginia resulted in an unconstitutional delegation of police power.

## ARGUMENT

### A. MATTERS OF GRAVE PUBLIC INTEREST ARE PRESENTED IN THIS CASE WHICH SHOULD BE REVIEWED AND DETERMINED BY THIS COURT.

Not only are the questions here presented Federal questions of substance which have, not previously been determined by this Court as far as we are able to learn, but they are questions of great public and general interest.

The first involves a conflict between the constitution of West Virginia and the Compact Clause (Article I, Section 10, Clause 3) of the Constitution of the United States.

The second involves the determination of the validity of interstate compacts, a question with respect to which this Court is the "final, constitutional arbiter."

The third and fourth questions involve the construction of a specific interstate compact, which construction can only be made with finality by this Court.

The issues presented in this case are of grave significance. The several states participating in the filing of this brief as *amici curiae* are vitally interested in the stability of the Ohio River Valley Water Sanitation Compact. This interstate compact, designed to control the pollution of the Ohio River and its tributaries, is a matter of great public importance to a large geographical area of our country. The decision of the Supreme Court of Appeals of West Virginia, in holding that participation by West Virginia in said compact was unconstitutional, will vitiate the

compact as far as West Virginia is concerned. In order for the compact to be successful, all of the states in the Ohio River basin must be participants therein. Without West Virginia, a key state in the basin, the compact cannot achieve its purposes.

The principles stated in the West Virginia decision may be held applicable by state courts in other states which are parties to the Ohio River Valley Water Sanitation Compact. This interstate compact, entered into by the various states pursuant to the provisions of Article I, Section 10, Clause 3 of the Constitution of the United States, is thus subject to threat of complete abrogation. This compact, creating an interstate or quasi-Federal relation among the participating states, will thus stand or fall, not on a basis of Federal law, but on a basis of the interpretation by a state court of the organic law of the state and of the compact provisions.

A graver danger exists. The principles announced by the Supreme Court of Appeals of West Virginia may be held applicable to other compacts wherein various states have attempted to solve interstate problems by agreement. Courts of other states may use this West Virginia decision as a precedent to decide that any compact is in violation of the constitution of that state, and therefore void. The practical effect of the West Virginia decision will be that all interstate compacts will be subject to such varying interpretations as may be given to their provisions by the courts of the participating states. The validity of all interstate compacts will thus be shrouded in doubt. If interstate compacts, sanctioned by Congress, are to rest on such a shifting, unstable foundation, it is submitted that they will be of little value in solving interstate problems.

The compact device provides a workable and effective method for the solution of regional problems among the states. This has been clearly recognized by the court in many cases. In *New York v. New Jersey* (1921), 256 U. S. 296, at 313, the Court recommended the compact method as an effective way for New York and New Jersey to settle their differences in respect to the pollution of the waters of New York Bay, saying:

"We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

In *Colorado v. Kansas* (1943), 320 U. S. 383, at 392, the Court said:

"The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agree-

ment should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power."

Although the Court has repeatedly recommended the compact method as being proper and effective to adjust and settle interstate problems, it is submitted that the value of the compact device will be lost if the power of a state to enter into an interstate compact may be limited by the provisions of the state constitution. Because of the uncertainty as to whether such compact is valid or not, it is believed that interstate compacts will fall into disuse, and states will be forced to litigation in order to settle their differences with other states. The import of the decision by the Supreme Court of Appeals of West Virginia will be to impair fatally the efficacy of the interstate compact as a means of settling and adjusting interstate or regional problems of states. Recommendations by the Court that the compact method be used to settle such problems (see footnote in *Colorado v. Kansas* (1943), 320 U. S. 383, at page 392) will thus be meaningless.

More important, however, even than this, is the possibility that this decision, if undisturbed, may well place in jeopardy a long list of compacts heretofore made by other states of the Union. The number of compacts alone is impressive. In 34 Yale Law Journal at page 735, there appears a list of 39 such interstate compacts which have been accomplished with the consent of Congress between the years 1789 and 1925. (*The Compact Clause of the Constitution—A study in Interstate Adjustments*). In the 1950 edition of the Book of the States (Council of State Governments) at page 26 there are listed 31 state compacts.

which have been accomplished with the consent of Congress during the period 1934 to 1939.

The parties to all these interstate compacts aggregate 38 states. An examination of the constitutions of these 38 states reveals that 21 of them contain both a debt limitation clause and a provision against pledging the credit of the state in language quite similar to that which is involved in the constitution of West Virginia. In the constitutions of 12 of such states there is found a provision against pledging the credit of the state in language similar to that of the West Virginia constitution. In the 5 remaining cases the state ~~constitutions~~ contain a debt limitation clause similar to that of West Virginia. Thus it is seen that in none of the states which are parties to the interstate compacts thus listed is the constitution wholly free of a provision with respect to which the decision of the Court below, if undisturbed, could be said to apply as a precedent; and it is conceivable, therefore, that grave doubt could be cast upon the validity of many of the compacts listed in the two publications cited above.

## B. THE SUPREME COURT OF APPEALS OF WEST VIRGINIA ERRONEOUSLY - DETERMINED FEDERAL QUESTIONS OF SUBSTANCE IN THIS CASE.

1. *Whether the power of a state of the Union to enter into compacts with other states of the Union to which consent and approval of Congress has been given pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States, can be limited or restricted by the provisions of its own constitution.*

The judgment of the Court below, in holding that West Virginia's ratification of the Ohio River Valley Water Sanitation Compact was a violation of a provision of the constitution of that state which prohibited the state from contracting a debt, would, if undisturbed, virtually prohibit that state from entering into any interstate compact whatever since it is only in the rarest of cases that a party to such compact would not be called upon to bear a fair portion of the expense involved therein.

It is not believed possible for a state thus to cast away one of its most important attributes of sovereignty, for the history of interstate compacts clearly shows their essential nature as such. They were utilized during the colonial period with the assent and approval of the Crown. During the period following the Declaration of Independence interstate compacts were utilized by the several states with the consent of the Continental Congress. It seems beyond argument that the inclusion of the compact clause in the Constitution of the United States was not only intended to place a limitation on the powers of the states to exercise this attribute of sovereignty but was also intended to affirm the power, in this respect, which the states had theretofore possessed, subject to the sole and exclusive limitation that the Congress of the United States consent to its exercise, such consent being substituted for that of the King, and, later, that of the Continental Congress.

It is to be remembered that under Article VI, Clause 2, of the Constitution of the United States, the Federal Constitution and all laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Accordingly, when Public Resolution No.

104, Seventy-Fourth Congress, which gave assent to the compact here under consideration, provided that "no such compact or agreement shall be binding or obligatory upon any state a party thereto unless and until it had been approved by the legislatures of each of such states whose assent is contemplated by the terms of the compact or agreement and by the Congress," it necessarily followed that the method thus prescribed for ratification of the Compact by the states was the only proper one by which such ratification could be made effective, and that such legislative ratification became the only condition precedent to its becoming effective. It further follows that such Congressional act, under Article VI, Clause 2, became the supreme law of the land, anything to the contrary in the Constitution of West Virginia notwithstanding. See *Hawke v. Smith, Secretary of State of Ohio* (1920), 253 U. S. 221, 64 L. Ed. 871.

This conception of the supremacy of Federal law in the matter of interstate compacts is supported by the following language of Chief Justice White in *Virginia v. West Virginia* (1918), 246 U. S. 565, 62 L. Ed. 883, at pages 601 and 602 of the U. S. Report, where the scope and effect of Article I, Section 10, Clause 3, was stated in the following language:

"The vesting in Congress of complete power to control agreements between states, that is, to authorize them when deemed advisable and to refuse to sanction them when disapproved, clearly rested upon the conception that Congress, as the repository not only of legislative power but of primary authority to maintain armies and declare war, speaking for all the states and for their protection, was concerned

with such agreements, and therefore was virtually endowed with the ultimate power of final agreement which was withdrawn from state authority and brought within the Federal power. \* \* \* ..

Any rule which would permit a State of the Union to place a constitutional restriction upon the power of its legislature to ratify an interstate compact would jeopardize the validity of virtually all such compacts now in existence, and would have the practical effect of virtually nullifying the inherent power to make such compacts which was expressly reserved to the states by Article I, Section 10, Clause 3. So considered, it can only be concluded that such a rule violates the Constitution of the United States and cannot be upheld.

2. *If the power of a state of the Union to enter into compacts with other states of the Union can be restricted by the provisions of its own constitution, does Article X, Section 4, of the Constitution of the State of West Virginia restrict such power?*

In the event that this Court should hold that the provisions of a state constitution can properly limit the power of a state to enter into interstate compacts then it becomes necessary to a determination of this cause to decide whether Article X, Section 4, of the Constitution of West Virginia does in fact limit such power. In this respect this Court is not bound by the interpretation of this constitutional provision by the Supreme Court of Appeals of West Virginia under the rules established in *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.* (1938), 304 U. S. 92, 110, Note 12, 82 L. Ed. 1202, 1212, 58 S. Ct. 803, and in *Kentucky v. Indiana* (1930), 281 U. S. 163, 74 L. Ed. 784, both cited hereinbefore.

The power of a state to make compacts with other states of the Union is an inherent power which the States possessed prior to admission to the Union under the United States Constitution. Upon the formation of the Federal Union, the Federal Constitution expressly guaranteed the continuation of such power in the several states, subject only to the requirement that it be exercised only with the consent and approval of Congress.

Article X, Section 4, of the West Virginia Constitution does not expressly deny or limit this inherent power. If it contains any such limitation of the power it must be by implication.

Article X, Section 4, purports to be only a limitation on the power of the legislature to regulate the fiscal affairs of ~~the~~ state. The idea that a provision relating to the ordinary fiscal affairs of the state was ever intended by the framers of this constitution or the people who adopted it virtually to deny to the state so important an attribute of sovereignty is one which strains the credulity of informed men, especially in view of the all too well known jealousy of sovereigns in guarding their powers.

Having in mind the importance of the power of the state in this respect as an attribute of sovereignty and considering the obviously narrow intended scope of Article X, Section 4, the conclusion that this constitutional provision, by implication, virtually destroys such attribute of sovereignty is indeed difficult to reach.

3. *If Article X, Section 4 of the Constitution of the State of West Virginia can and does restrict the power of that state to enter into compacts with other states of the Union, then, does Article X or any other provision of the*

*Ohio River Valley Water Sanitation Compact subject the State of West Virginia to any obligation in violation of the above mentioned Article and Section of its constitution?*

The prohibition of Article X, Section 4, of the Constitution of West Virginia against the contracting of any debt is subject to certain exceptions enumerated therein. Among these is "to meet casual deficits in the revenue."

The meaning of "casual deficits in the revenue" was considered by the Supreme Court of Appeals of West Virginia in *Dickinson v. Talbott* (1933), 114 West Virginia 1, 170 S. E. 425. In that case the Court had under consideration an attack on a legislative act authorizing a bond issue in the amount of five million dollars on the ground that it violated the provisions of Article X, Section 4, of the state constitution. In holding that act valid despite the constitutional limitation on the incurrence of a debt, the Court, speaking of the effect of this constitutional provision as applicable to legislative control of the state's fiscal affairs said, *inter alia*:

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"The state's constitutional requirements are for the preservation of the state and the maintenance of its integrity and for the protection of the people. Constitutional limitations must not be so construed as to be subversive of their very purpose. \* \* \*

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"Apropos of both sections 4 and 5, Article X, West Virginia Constitution, it is not to be considered that the framers of our Constitution or the people of the state in ratifying and approving

the same, meant to place barriers in the path of the state officials and the legislators, so circumscribing the fiscal affairs of the state as to create impossibility of escape from embarrassing situations."

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"The state of West Virginia is sovereign save only as it has relinquished certain prerogatives to the federal government. In the exercise of the sovereign attribute of enacting laws the legislative power is inherent; therefore, in construing an act of the state legislature, reference must be had to the state and federal constitutions, not in search of a grant of power, but to ascertain if there is a limitation or restriction of power \* \* \*. In the acts under consideration the legislature, in our judgment, has not violated any constitutional limitation of its authority but has properly acted under its broad and plenary power to provide for the welfare of the state."

It is easy to conclude that if these rules of constitutional interpretation had been applied in the instant case, the Court below could not have formed the decision which it did.

The conclusion of the Court below that the ratification of the compact here under examination did purport to create a debt in violation of Article X, Section 4, must necessarily have been based on a consideration of the provisions of the Compact itself. The only references made in the Compact to fiscal affairs appear in Article V and X, which read in part as follows:

## “ARTICLE V

.....

“The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

“The Commission shall keep accurate books of account, showing in full its receipts and disbursements, and said books of account shall be open at any reasonable time to the inspection of such representatives of the respective signatory States as may be duly constituted for that purpose.

.....

“The Commission shall not incur any obligation of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof.”

## “ARTICLE X

“The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the governors of the signatory States, one-half of such amount to be prorated among the several states in proportion to their population within the District at the last preceding Federal census, the other half to be prorated in proportion to their land area within the District.”

As to Article V, the language clearly evinces a deliberate effort to renounce any notion of contravening the constitutional requirements, in fiscal affairs, of any of the signatory states. Clearly, the Court below could not have had anything in this Article in mind in reaching the conclusion it did.

There is, however, in Article X, what purports to be an agreement among the signatory states for the sharing of expenses of the project being established; and what purports to be an agreement to appropriate funds therefor.

Since it is virtually a universal rule that a particular legislature cannot be bound in advance to appropriate funds for particular purposes, it would appear that it is this provision in Article X of the compact which led the Court below to reach the conclusion it did.

Did this language of Article X actually create a debt within the meaning of Article X, Section 4, of the Constitution of West Virginia? Since a particular legislature cannot be legally bound in advance to make any particular appropriation of funds it is difficult to see how a "debt" could be created by such an "agreement." The practical interpretation to be given to such an "agreement" is that the executive officials of the several signatory states agreed to use their influence in urging such appropriations by future legislatures to the end that necessary funds would be provided.

The legal position of a signatory state under the language of Article X of the compact is no different than it would be when the legislature of such state authorizes

the construction of a state institution or the creation of a new department of the government. A moral obligation to provide funds in the future to maintain and support such institution or department certainly would be present even though no legal obligation might exist. In actual practice every state government in the Union, and the Federal government as well, operates continually on this basis, for governments as well as individuals must necessarily depend heavily on moral as well as legal obligations. In this respect it can truly be said that it is the moral quite as often as the legal obligation which gives life to the promises which governments and men live by.

Viewed in this light, the provisions of the compact and the West Virginia statute ratifying it and enacting it into law can and should be construed so as to uphold their constitutionality.

*4. Whether ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the Legislature of the State of West Virginia resulted in an unconstitutional delegation of police power or of legislative authority.*

The judgment of the Court below, in holding that the ratification and enactment into law of the compact was an invalid delegation of the police power of the state was obviously based on what was thought to be an improper attempt to authorize the Ohio River Valley Water Sanitation Commission to:

- (a) Require a minimum treatment of sewage and industrial wastes discharged into water of the Ohio drainage basin, and

- (b) Issue orders to citizens of the signatory states to compel abatement of any discharge of sewage or industrial waste in violation of the compact. Such authority is given to the Commission in Article VI and IX of the Compact.

However, it is provided in Article IX of the Compact that no such order shall be effective against any corporation, person or entity within a state unless and until it receives the assent of not less than a majority of the Commissioners of such state.

Under the provisions of Section 2 of House Bill No. 369, passed March 11, 1939, the legislative act by which West Virginia ratified this Compact, two of the Commissioners representing that state are to be appointed by the Governor with the advice and consent of the Senate; and the third is to be the state commissioner of health, by virtue of his office.

Accordingly, control of the power of the Ohio River Valley Water Sanitation Commission to issue orders affecting West Virginia citizens is vested in administrative officials of that state quite as fully as though that state, acting alone, had created a commission to carry out the purposes for which the Compact was made.

Nor is it improper, under West Virginia law, for the legislature to create such an administrative board or commission and to clothe it with rule-making power, provided the legislature prescribes the policy and aims of the project concerned and establishes standards for guidance of the administrative body. This conclusion is clearly supported by the views of the minority of the West Virginia

court as expressed in the dissenting opinion filed below in this case. In *State v. Bunner* (1943), 126 W. Va. 280, 27 S. E. (2nd), p. 823, the Supreme Court of Appeals of West Virginia said:

"A statute requiring the public health council to adopt regulations to provide clean and safe milk and fresh milk products; and providing that the violation of regulations of the council which are reasonable and not inconsistent with law shall be a misdemeanor, is not unconstitutional as an improper delegation of legislative authority."

To the same effect is the rule stated in *Rinchart v. Flying Service* (1940), 122 W. Va. 392, 9 S. E. (2d) 521.

While perhaps a good case could be made for the proposition that the exercise by a state of its inherent right of compact with other states of the Union must normally be expected to involve the surrender of some degree of sovereignty for the common good, just as the nation surrenders some degree of sovereignty in concluding a treaty with a foreign state, it is not necessary in the case at bar to pursue this line of reasoning. In this case the language of the Compact clearly evinces a deliberate and studied attempt on the part of its framers to avoid the least encroachment on the sovereignty of the signatory states. Indeed, there may be some question whether it has not leaned too far in this direction to permit effective attainment of its objectives. Certainly it should not be struck down by the courts for encroachment on state sovereignty when that sovereignty is so clearly acknowledged and guaranteed by the terms of the Compact itself.

## CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari in this cause should be granted.

Respectfully submitted,

HERBERT S. DUFFY,  
*Attorney General of the State  
of Ohio*

WILLIAM C. BRYANT,  
*Assistant Attorney General of the  
State of Ohio*

J. EMMETT McMANAMON,  
*Attorney General of the State  
of Indiana*

A. E. FUNK,  
*Attorney General of the Common-  
wealth of Kentucky*

SQUIRE N. WILLIAMS, JR.,  
*Assistant Attorney General of the  
Commonwealth of Kentucky*

IVAN A. ELLIOTT,  
*Attorney General of the State  
of Illinois*

LUCIEN S. FIELD,  
*Assistant Attorney General of the  
State of Illinois*

NATHANIEL L. GOLDSTEIN,  
*Attorney General of the State  
of New York*

CHARLES J. MARGIOTTI,  
*Attorney General of the Common-  
wealth of Pennsylvania*

H. F. STAMBAUGH,  
*Special Counsel to the Attorney  
General of Pennsylvania*

M. VASHTI BURR,  
*Deputy Attorney General of the  
Commonwealth of Pennsylvania*